



U.S Environmental Protection Agency



U.S. Department of Justice

January 11, 2001

MEMORANDUM

SUBJECT: Issuance of "Model CERCLA Peripheral Party Cashout Consent Decree" and "Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree"

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TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
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We are pleased to issue the final version of two new model CERCLA judicial consent decrees: the "Model CERCLA Peripheral Party Cashout Consent Decree" and the "Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree." These models are to be used as guidance by EPA and DOJ staff when negotiating CERCLA judicial consent decrees with qualifying peripheral parties. They are designed to be used in conjunction with the "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (signed September 30, 1998; corrected copy issued December 22, 1998) ("Section 122(h) Guidance"). The Section 122(h) Guidance describes appropriate candidates for peripheral party cashouts (in Subsection II.B.3.a), including settlements based on ability to pay ("ATP"), outlines the basic terms of peripheral party settlements (in Subsections II.B.3.b and

II.C), and explains when such settlements should be embodied in a judicially-approved consent decree rather than in an administrative settlement (in Subsection II.B.3.a). Model administrative settlements for cashing out ability to pay peripheral parties and non-ability to pay peripheral parties were issued as Appendices B and C, respectively, to the Section 122(h) Guidance.

Ability to pay cashout settlements, whether embodied in an administrative agreement or a judicial consent decree, must be based on a fully-documented ability to pay analysis and require payment of an appropriate ability to pay amount as outlined in the “General Policy on Superfund Ability to Pay Determinations” (September 30, 1997). This is important because the ATP model settlements do not include reservations of rights for changed financial circumstances. They presume instead that all appropriate payment amounts, including payments from potential future sources of income, are captured by the ATP settlement itself.

Thus, in addition to the standard lump sum or installment payment provision, the ATP models include an optional provision for payment of a percentage of the net proceeds of the sale of the site or other property owned by the settling party. In particular, ATP settlements with site owners should address the value of the site property as cleaned up in determining the payment amount. The ATP models also remind the negotiating team that, if the settling party has a claim relating to the site for insurance coverage or contractual indemnification, the team should consider including a provision under which EPA receives a percentage or a fixed amount of any potential recovery. Finally, the ATP models note that, if financial circumstances exist which would justify inclusion of any other type of conditional payments, such as payment of a percentage of future earnings or a percentage of the proceeds of a future sale of assets other than the site or other real property, the negotiating team should consider whether such a provision should be included in the settlement as well.

We encourage our staffs to adhere as closely as possible to the terms of these two models, subject to modifications needed to reflect site-specific circumstances. Until the Agency obtains additional experience with peripheral party settlements, Regions are requested to consult with the Director of the Regional Support Division in OSRE on whether a particular PRP qualifies as a peripheral party. Ability to pay peripheral party settlements are excluded from this consultation requirement provided that they are documented and contain payments in accordance with the “General Policy on Superfund Ability to Pay Determinations.”

We would like to thank all EPA and DOJ staff who assisted in the development of these models. If you have any questions about these models, please contact Janice Linett of the Regional Support Division at (202) 564-5131 or David Glazer of the Environmental Enforcement Section at (415) 744-6477.

Attachments

cc: Lisa K. Friedman, Associate General Counsel for Solid Waste and Emergency Response
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